IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.2315 OF 1984

The Municipal Corporation of
Greater Bombay. .. Plaintiffs

Versus

Bharat Barrel & Drum Mfg.co.Ltd... Defendants

Mr.H.Toor i/b Crawford Bayley & Co. for plaintiffs

Mr.Mukesh Subramanian for defendants

CORAM : P.V.KAKADE, J.

DATE : 29TH OCTOBER, 2004.

P.C.:

1. The Plaintiff, a statutory Municipal Corporation, constituted under the Bombay Municipal Corporation Act, 1888, owns and Undertaking called the Bombay Electric Supply and Transport Undertaking which supplies electricity to consumers in Mumbai and is a Licensee as

defined under Section 2(h) of the Indian Electricity Act, 1910 and is licensed under Part II of the Act to supply energy. It has filed the suit against the defendant for recovery of Rs.2,28,946.58 along with interest thereon of the dues of the electricity supplied.

2. The defendant is a long-standing consumer of Industrial (High Voltage) electricity supplied by the Plaintiff under written contracts entered into and executed by and between the plaintiff and defendant. At the relevant time, the defendants was supplied Industrial (High Voltage) electricity by the plaintiff under the Agreement dated 5th March 1979. It is noteworthy that the Form of Agreement with Industrial H.v.Consumers had been approved by the Government of Maharashtra, Industries, Energy and Labour Department by Resolution No.LBY-1671/CR-158/209716/NRG-4 dated 21st February, 1978. Some of the material clauses of the agreement dated 5th March 1979, are as hereunder:

> Clause 1 provides that the consumer shall be supplied electricity upto a power load of 588

Kilovoltamperes (KVA) Maximum Demand (called the "Contract Demand").

Clause 7 provides that the maximum period of supply of electricity shall be five years subject to the parties right to terminate the Agreement. the Agreement shall be terminable by not less than six calendar months' previous notice in writing of the intention to terminate it. Upon the expiration of any such notice, the Agreement shall determine but without prejudice to the rights of either party against the other in respect of any matter antecedent to such termination.

Clause 11 (i) provides that the consumer shall pay each month to the Corporation for electricity supplied during the preceding month such amount as shall be calculated and ascertained in accordance with the rate Schedule, set out in Exhibit-A to the Agreement. The provisions of the said Exhibit-A shall be deemed to be incorporated with and to form part of the Agreement.

The Rate Schedule - IND (HV) set out in Exhibit-A to the Agreement sets out, inter alia-

"2. Conditions of Supply (b) the Consumer agrees to pay the minimum charges fixed under the agreement irrespective of the extent of consumption,

3. Rate

A. The rates for demand and energy charges in any month will be in accordance with the tariff shown below :-

(i) Minimum Demand Charges (i.e. M.D. Charges)

Rs/25.00 per KVA for the first 500 KVA of billing demand, PLUS

Rs.21.10 per KVA of billing demand in excess of 500 KVA , PLUS

(ii) Energy Charges

Rs.00.1300 per unit for the First 1,50,000 units,

PLUS

Rs.00.1100 per unit for units in excess of 1,50,000 upto and including 15,00,000 units,

PLUS

Rs.00.1060 per unit per units in excess of 15,00,000 units

8. Delivery Payment Charges : Bills must be paid within 10 days of presentation. If not so paid, a delayed payment charge will be levied at 1/2% per week or part thereof on the total bill amount (including Government Electricity Duty) starting from the date of presentation of the bill. This is without prejudice to the rights of the

Undertaking to disconnect supply for non-payment"

It is to be noted that the Rate Schedule - INDA (H.V.) set out in Exhibit-A to the Agreement has been signed by the chairman of the Defendant, who has also signed the agreement.

Clause 11 (ii) provides that if the consumer neglects to pay any charge for electrical supply due to the Corporation under the Agreement, the corporation may exercise the powers conferred by the Indian electricity Act, 1910, as to cutting off the supply but without prejudice to any other remedies of the Corporation.

Clause 12 provides for provision of Security deposit in cash or Government Securities by the Consumer.

Clause 22 provides that the Agreement shall be construed in accordance with the provisions of the Indian Electricity Act, 1910 and the rules and regulations thereunder. also, the Consumer

shall be deemed to have full knowledge of all Conditions (i.e. Conditions of Supply) made by the Corporation from time to time.

The agreement dated 5th March 1979 has been duly signed, sealed and executed on behalf of the plaintiff and Defendant.

3. The Plaintiff, under the Agreement dated 5th March, 1979, provided supply of the contractual electricity to the Defendant. The defendant, initially, regularly paid the electricity Bills issued by the Plaintiff under the agreement. The plaintiff issued Bill dated 12.11.1981 for Rs.53,145.90 for bill period from 1.10.1981 to 31.10.1981 to the defendant. The defendant, by letter dated 20.11.1981, informed the Plaintiff that all employees of the defendant, with effect from 21.10.1981, have commenced an illegal strike and the defendant was in no position to pay the bills of the plaintiff. The letter requested the plaintiff to bear with the defendant, and stated that the defendant would make payment of the bills, after the strike. The plaintiff, by letter dated 10.12.1981, replied that the bills are issued under the Agreement INDA (H.V.) tariff, and are

required to be paid within 10 days, failing which delayed payment (DP) Charges @ 2% per week will be levied. The plaintiff called upon the defendant to expedite payment of the bills.

4. The plaintiff issued bill dated 11.12.1981 for Rs.70,050.89 (including arrears) for bill period from 1.11.1981 to 30.11.1981 to the defendant. The defendant, by letter dated 14.12.1981, reiterated that the defendant was unable to pay the bills issued by the plaintiff, due to the labour strike, and that the defendant, after the strike, would pay the bills. The plaintiff, on 29.12.1981, disconnected electricity supply to the defendant, due to non-payment by the defendant of the Bills issued by the plaintiff. In any case, the defendant had also sought disconnection of electricity supply because of the pending labour strike. Thereafter, the plaintiff issued Bill dated 12.1.19081 for Rs.84,336.35 (including arrears) for bill period from 1.12.1981 to 31.12.1981 to the Defendant. The defendant, by letter dated 16.1.1982, stated that the defendant, since 21.10.1981, had no consumption of electricity due to the labour strike, and inquired of the plaintiff, the basis on which the Bills are issued.

The plaintiff, by letter dated 9.2.1982, expressed understanding of the defendant's difficulty in payment of the bills due to the labour strike, but clarified that the circumstances did not mitigate the liability of the defendant to pay the bills which are preferred on basis of Minimum Charges as per the IND (HV) Agreement. The letter called upon the defendant to pay the Bills failing which the plaintiff would terminate the IND (H.V.) Agreement.

5. Further, the plaintiff, by letter dated 27.4.1982, clarified to the defendant that contractual electricity was supplied to the defendant under IND (H.V.) Agreement subsisting between the plaintiff and the defendant, and that the defendant would have to pay the bills issued by the plaintiff until termination of the Agreement. The letter stated that the defendant had failed to pay the bills, and the plaintiff, under clause 7 of the agreement, was giving six (6) months Notice for termination of the agreement. The agreement, therefore, would be treated as terminated on 26.10.1982. However, the plaintiff, during the notice period of six months, would be issuing bills on basis of the Agreement. Thereafter on 26.10.1982, the agreement dated 5th March

1979, stood terminated. The defendant, meanwhile, failed and neglected to clear and pay the bills issued by the plaintiff. The defendant, by letter dated 30.12.1982, stated that the defendant was unable to maintain 'Contract Demand' due to the labour strike since 21.10.1981, and that the labour strike constituted ' force majeure' circumstances. The letter further stated that the plaintiff had issued bills from 1.10.1981 to 31.10.1982 though the defendant had not consumed the electricity from 21.10.1981. The defendant requested the plaintiff to waive the Minimum Demand Charges, D.P. Charges etc. and consider the case of the defendant sympathetically.

6. The plaintiff issued Final Bill dated 20.2.1983 for Rs.2,85,928.08 (including arrears) for the total bill period from 1.10.1981 to 26.10.1982 to the defendant. The defendant, however, failed and neglected to clear and pay the Bill issued by the plaintiff. The plaintiff, by letter dated 2.15.1984, stated that the defendant was a contractual electricity consumer under the Agreement dated 5th March 1979, which was terminated with effect from 26.10.1982. The plaintiff under the agreement had issued bill for Rs.2,85,928.08 for the

total bill period from 1.10.1981 to 26.10.1982 which the defendant had failed and neglected to clear and pay. Therefore, the plaintiff, against the said bill, had adjusted the defendants' Security Deposit monies amounting to rs.86,487.44 lying with the plaintiff, towards the said bill. The letter called upon the defendant to pay the balance sum of Rs.1,99,440.34 failing which the plaintiff would take legal action against the defendant. The defendant, however, failed and neglected to clear and pay the outstanding claimed by the plaintiff. The plaintiff, in the circumstances, is claiming a sum of Rs.2,28,946.58 (being the outstanding Rs.1,99,440.34 together with interest thereon @ 18% per annum upto the date of filing of the Suit) together with interest thereon @ 18% per annum from the date of filing of the suit till payment or realisation.

7. The defendant resisted the suit and filed the written statement. From the written statement of the defendant, it is clear that the defendant does not contest the correctness of contents and/or execution of the agreement dated 5th March 1979, and other documents referred to in the plaint,. However, the defendant in

paragraphs 2 and 4 of the written statement avers that the plaintiff and defendant, from time to time, have entered into agreements for supply of contractual electricity. The defendant refers to and relies upon one such agreement dated 1.6.1963 together with its annexures. It is the case of the defendant that the agreement dated 5th March 1979, is nothing but a renewal of the agreement dated 1.5.1963, and that the agreement dated 1.6.1963 is in subsistence and binding upon the parties. The defendant contends that clause 18 of the General Conditions and Technical Regulations to the Agreement dated 1.6.1963 provides for exemption and protection in the case of labour strike against Claim for Minimum Demand Charges made by the plaintiff. The said clause 18 provides as follows:

> "18. Corporation’s Remedies : If the consumer shall at any time during the continuance of the Agreement :
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> * * * * * * * * * * * *
>
> (e) fail to take 50 percent of the supply contracted for during any

continuous period of one year unless prevented by reason of any of the following causes viz., labour strike, plague, famine, hurricane, tempest, riot and civil commotion, mutiny, war, earthquake, or act of God bona fide interfering with the working of the Factory;

then and in any such case, it shall be lawful for the Corporation without prejudice to its right against the consumer at law in damage for breach of Agreement or any other rights and remedies of the Corporation under the Act or otherwise to discontinue the supply of electrical energy and to put an end to this Agreement and the Consumer hereby authorised the Corporation, its servants and agents to enter upon the premises and to seize and take away all meters, plant, apparatus, equipment and other property of the Corporation in or upon the same....."

. Alternatively , it is the further case of the

defendant that there had not been any consumption of contractual electricity by the defendant from 21ast October, 1981 (Commencement dated of the labour strike) to 26th October, 1982 (Termination date of the agreement dated 5th March 1979) and as such, there could not be any levy of Minimum Demand Charges made by the Plaintiff and hence the suit was sought to be dismissed.

8. On the basis of the pleadings the issues were settled. The issues and my findings thereon are as follows:

ISSUES.	FINDINGS
1. Whether the plaintiff proves that the defendant, under agreement dated 5th March, 1979, is liable to pay electricity charges and dues of the plaintiff?	In the affirmative.
2. Whether the defendant proves that labour strike at the defendant’s factory constitutes a force majeure circumstances?	In the negative.

3.	Whether the defendant proves that the defendant is exempted from payment of the plaintiff's electricity charges and dues under a force majeure circum-stances?	In the negative
4.	What Judgment?	As per final order below
5.	What reliefs?	As per final order below.

9. I heard the learned counsel for both the parties. I have perused the entire evidence on record. A bare perusal of the agreement dated 1.6.1963 and agreement dated 5th March 1979, shows that the agreements differ in form and content. At the beginning of the agreement dated 1.6.1963, Clause 1 provides that the consumer shall be supplied electricity upto the total amount of 500 Kilovoltamperes (KVA) (called "the Contract

Demand"). The Contract Demand under the agreement dated 1.6.1963 is different from and lesser than the Contract Demand under the Agreement dated 5th March 1979. More importantly, the plaintiff and defendant have duly entered into and executed the Agreement dated 5th March 1979, in lieu and instead of prior agreements between the parties (including the Agreement dated 1.6.1963). The defendants has nowhere in the written statement disputed the correctness of contents and/or execution of the agreement dated 5th March 1979. The defendant, having admittedly entered into and executed into fresh and new agreement dated 5th March 1979, in rescission and substitution of the earlier agreement between the parties, cannot refer to and rely upon old agreement dated 1.6.1963.

10. A reference to clause 2(6) of the Rate Schedule - IND(H.V.) set out in Exhibit-A to the Agreement dated 5th March 1979, clearly provides that the Consumer (defendant) has agreed to pay the Minimum Demand Charges fixed under the agreement irrespective of the extent of consumption of the Consumer (Defendant). The Plaintiff submits that the supply of contractual electricity ("Contract Demand" being 558 KVA Maximum Demand) to the

Defendant results in insurance of capital expenditure and other standing charges by the plaintiff, and statutory levy of Minimum demand charges (under the Proviso to Section 22 of the Indian Electricity Act, 1910) enable and provide for a reasonable return to the plaintiff on the capital expenditure and other standing charges. Section 22 of the Indian Electricity Act, 1910, provides -

> "22. Obligation on license to supply energy:
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> Where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled. On application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply;
>
> Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed

with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration."

11. It is to be noted that the Proviso to S.22 provides for statutory arbitration in cases of differences or disputes about payment of the Minimum Demand Charges. In this context, Section 52 of the Indian Electricity Act, 1910, lays down :

"52. Arbitration:

Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided int he license of a licensee, be determined by such person or persons as the State Government may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject

to the provisions of the Arbitration Act, 1940 (10 of 1940):

Provided that where the Government or a State Electricity Board is a party to a dispute, the dispute shall be referred to two arbitrators, one to be appointed by each party to the dispute."

. The plaintiff submits that Section 52 provides that the statutory arbitration shall be governed by and subject to the provisions of the Arbitration Act, 1940 (earlier and later by the Arbitration and Conciliation Act, 1996). The Plaintiff further submits that the defendant has filed written statement in the suit, and consequently, there cannot be stay of the suit and referred to the matter for arbitration, in light of the provisions of Section 34 of the Arbitration act, 1940 (and Section 8 of the Arbitration and Conciliation Act, 1996).

12. The Plaintiff on the legality and validity of levy of Minimum Demand Charges irrespective actual consumption of contractual electricity has relied upon

several rulings including the Apex Court ruling in the case of Bihar State Electricity Board Patna and Ors. vs. Green Rubber Industries and Ors. - (1990(1 SCC 731 wherein it is held thus -

> "It is seen that the rule of charging minimum guaranteed charges has been in vogue since long. In the London Electric Supply Corporation (Ltd.) v. Priddis, the agreement between the appellant company and the consumer to supply electricity in clause 4 provided that the "consumer shall have the option at or after the expiration of five years from the date of installation" of purchasing the installation at a price. Clause 7 and : "The consumer shall until purchase as aforesaid pay quarterly to the supply company for the use of the installation 3/4d. per Board of Trade Unit for every unit of electrical energy supplied to the said premises and the minimum payment in any year shall be 1s. for each eight-candle power lamp or its equivalent installed." During the period from Mid-summer to Michaelmas, 1900, the defendant did not use any electricity supplied by the plaintiff and the

question was whether under the agreement the defendant was bound to pay the minimum payment provided for by clause 7, even though in fact he had used none of the plaintiff's electricity during the quarter. The Lord Chief Justice in giving judgment said that "it was sufficiently clear that the installation was put in on the terms that the customer should have the right to purchase the installation after five years, and during that five years the customer should be liable to pay minimum rent whether the current was de facto used or not. The minimum rent had no reference to the amount of current used, and it was, therefore, clear that the mere fact that the defendant had not taken any current or a small current did not affect the case" and therefore it was held that the clause was that the minimum rent did not merely cover the actual use but the right to use the current and therefore, customer had to pay for the right to use the current, although he did not in fact use it."

. It is true that the agreement is in a standard

form of contract. The standard clauses of this contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy. It is a type of contract on which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance and is not open to discussion. It is settled law that a persons who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. Therefore, considered by the test of reasonableness it cannot be said to be unreasonable inasmuch as the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end.

. In view of this position, there cannot be any hesitation in holding that the agreement was reasonable and valid and it was not determined with the

disconnection of supply to the respondent firm by the Board on September 28, 1981 but only according to the stipulations in clause 9(b) of the agreement as discussed above. The liability to pay the minimum guaranteed charges therefore, continued till the determination of the contract irrespective of the fact that the defendants were unable to utilise the supply due to labour strike, which cannot be said to be circumstances as "force majeure". In view of this position the grounds taken up by the defendant for non payment cannot be accepted in law and therefore, I hold that the plaintiff has proved its case in toto against the defendant. Under clause 8 of the Rate Schedule and IND (H.V.) set out in Exhibit-A to the Agreement dated 5th March 1979, is due and liable to pay the delayed payment charges. The advocate for the plaintiff submitted that the defendant should pay the interest at the rate of 24% p.a. However, the claim is restricted to 18% p.a. In view of the facts and circumstances, I am inclined to restrict the rate of interest @ 12% p.a. Accordingly all issues are answered as noted above and I proceed to pass the following order:

O R D E R

1. The suit is hereby decreed with costs.

2. The defendants shall pay Rs.2,28,946.58 to the Plaintiff with interest at the rate of 185 p.a. on Rs.1,99,440.34ps. from the date of the suit till payment or realisation.

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